IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

UNITED STATES OF AMERICA)
)
v.) Criminal Docket No. BPG-16-2254
)
HAROLD T. MARTIN, III,)
Defendant)

Baltimore, Maryland
October 21, 2016
2:35 PM to 3:41 PM

THE ABOVE-ENTITLED MATTER CAME ON FOR DETENTION HEARING
BEFORE THE HONORABLE A. DAVID COPPERTHITE

A P P E A R A N C E S

On behalf of the Government:

Zachary A. Myers, Assistant U.S. Attorney
Harvey Eisenberg, Assistant U.S. Attorney
Thea D.R. Kendler, Trial Attorney

On behalf of the Defendant:

James Wyda, Federal Public Defender
Deborah L. Boardman, Assistant Federal Public Defender

Also present:

FBI Special Agent Laura Pino

Proceedings recorded by mechanical stenography, transcript produced by computer.

MARTIN J. GIORDANO, RMR, CRR
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PROCEEDINGS OF OCTOBER 21, 2016

THE CLERK: All rise. The United States District Court for the District of Maryland is now in session, The Honorable A. David Copperthite presiding.

THE COURT: Good afternoon, everyone. You can be seated.

MR. EISENBERG: Good afternoon, Your Honor.

MR. MYERS: Good afternoon, Your Honor.

THE COURT: Give me just a minute to get set up here, please.

(Pause.)

THE COURT: Mr. Myers?

MR. MYERS: Yes, Your Honor. Good afternoon, Your Honor. Assistant United States Attorney Zachary Myers here on behalf of the Government to call the matter of *United States of America versus Harold T. Martin, III*. This is Criminal Number BPG-16-2254. I'm here with Assistant United States Attorney Harvey Eisenberg, Trial Attorney Thea Kendler from the National Security Division, and Special Agent Laura Pino of the FBI, here for this afternoon's detention hearing.

THE COURT: Okay. Good afternoon.

MR. WYDA: Good afternoon, Your Honor. It's Jim Wyda from the Federal Public Defender's Office. Here with me at counsel table is First Assistant Federal Public Defender Deborah Boardman. Also with us at counsel table is

Hal Martin.

THE DEFENDANT: Good afternoon, Your Honor.

THE COURT: Good afternoon, everyone. Good afternoon, Mr. Martin. You can be seated.

Has everyone had the opportunity to review the Pretrial Services report?

MR. MYERS: Yes, Your Honor.

MR. WYDA: Yes, Your Honor.

THE COURT: I've also reviewed the motion by Defendant, response by the Government, and reply that's been filed by the Defendant in this case.

Mr. Myers --

MR. MYERS: Yes, Your Honor.

THE COURT: -- I'll hear from you.

MR. MYERS: Your Honor, the Government is moving for the pretrial detention of the Defendant pursuant to Title 18 United States Code § 3140, or -- excuse me -- § 3142(f)(2)(B) because there is a serious risk that the Defendant will not appear as required should he be released.

As the Court knows, there are a number of factors to be considered under § 3142(g) in making the Court's determination on release, and we believe that each of them counsels towards holding the Defendant pending trial.

The nature and circumstances of this offense are extremely serious. As the Court knows, this offense involves the theft of irreplaceable classified material on a breathtaking scale. Many thousands of pages of highly-classified material were recovered from his home, along with approximately 50 terabytes of digital material, a substantial quantity of which is highly classified, and a substantial quantity of the total material seized is highly classified and has -- and much of it has special handling caveats among what's been located and reviewed at this point.

The offense here is part of a persistent pattern of behavior, committing serious felonies over the course of approximately 1996 to the moment he was arrested. There is no reason to believe that the Defendant would have ever stopped but for the intervention of law enforcement; rather, he clearly planned to keep all of this stolen material for whatever purpose he chose.

The weight of the evidence is also overwhelming and counsels towards detention. The sheer quantity of the wholesale theft taking place over two decades of an astounding amount of highly-classified, and yet haphazardly and openly stored through his house, material in his house, his shed, and his car -- his car which was parked in his driveway at the time of the execution of the search warrants, and it, in and of itself, contained a huge quantity of hard-copy documents as well as a large-capacity external hard drive containing highly-classified material.

At the time officers encountered him, Mr. Martin was walking between his home and car holding a portfolio that itself contained documents, including documents marked highly classified, and, when initially confronted, Mr. Martin lied and denied taking classified information, notwithstanding the outrageous quantity of it -- of information marked "Classified" openly left about his home and even in his hands when he was encountered. Later, he would only admit, when directly confronted with specific seized materials, that he had, in fact, removed classified material from his workplaces and that he knew it was wrong.

Over the course of 20 years in the Government's trust, signing a number of nondisclosure agreements and undergoing extensive training, it was crystal clear to the Defendant what his legal and patriotic duty were to protect and properly handle this classified information and the reason why such measures are necessary, which is the extreme damage that such violations of the law can do to the nation's security.

Mr. Martin's history and characteristics also counsel the Court towards ordering detention pending trial. Mr. Martin has held security clearances from the United States government since 1988, and his career of government contracting is not a mitigating factor in this case. It is the manner and means of the offense.

Furthermore, for one of the offenses that he is charged with, it's an element of the offense, and any appeal to his prior service to the country should fall on deaf ears given his 20 years of extremely dishonorable crimes putting the nature -- excuse me -- putting the nation, including its servicemembers, at risk. He is no longer employed and has no reasonable prospect of legitimate employment in the field he's been working for -- working in for his entire career.

Through that work, he's gained extensive knowledge and experience, including information -- excuse me -- including knowledge and training on encryption, anonymization, and counter-forensics, and we know that not only did he know about these things, but, based on the forensic examination of his seized digital media thus far, he, in fact, had software and information relating to those topics on devices that were seized. We know that the Defendant had Cloud storage accounts and has the knowledge and training to access and disseminate digital information without leaving forensic evidence.

His years of government and academic training facilitated his commission and concealment of these offenses for over 20 years and would facilitate his ability to obstruct justice, flee the jurisdiction of this Court, or further compromise the country through dissemination of this highly-classified information, including by a computer.

Mr. Martin's crime -- Mr. Martin's history of committing crimes of betrayal and deceit are the best demonstration of his character. His claims to love his country are belied by the willful decisions he had made to betray its trust and compromise its secrets.

The only person in the District of Maryland that Martin is apparently tied to is -- outside of his employment is the woman he refers to as his wife and who he lived with at the time of his arrest. The Government is aware of no other family ties in the community. And Martin lives in Maryland because it's a vital nerve center of the government and of the intelligence community. His long-time residence in the district is not a reason to release him. It's what enabled his crimes, and, now that he's lost his employment, his career, and his clearance, there is no reason to believe that simply having a house in this district in any way mitigates the danger that his release would pose.

Now, pursuant to the statute, the Court is also, in a case like this, entitled to consider the nature and seriousness of the danger posed by release in determining whether he presents a risk of flight sufficient to order detention.

MR. WYDA: Your Honor, I'm not sure I understand where this is going in light of Your Honor's ruling earlier --

THE COURT: I'm assuming that you are arguing under § (g)(4) --

MR. MYERS: That's correct, Your Honor.

THE COURT: -- and § (g) of § 3142.

MR. MYERS: That's correct, Your Honor. I'm only arguing dangerousness as to the nature and seriousness of it as the Court considers whether there is, in fact, sufficient risk of flight.

THE COURT: And I will hear those arguments.

MR. WYDA: Your Honor, may I ask for a clarification? It's my understanding that could be used to set conditions, but it can't be used -- it obviates the --

THE COURT: Once the Government moves for detention, even if they have a basis for detention, the Court still has an obligation to address the factors in § (g), so I will hear from him, but I will also hear argument from counsel as well on that issue.

MR. WYDA: Just so I can make my record, I guess there was a misunderstanding earlier. If Your Honor is going to detain on the basis of dangerousness, which is what this is --

THE COURT: I'm looking at the issue of risk of flight.

MR. WYDA: And so is this --

THE COURT: That's the only basis. However, under § (g), there are other factors the Court has to consider when they release someone.

MR. WYDA: Well, then we're on the same page, Your Honor, but that's not what I'm hearing from the Government. I'm hearing a basis for detention, not a basis for setting release conditions.

MR. MYERS: And --

THE COURT: Well, it's not necessarily release conditions that are set forth in § (g). So, based on § (g), I will hear from you, Mr. Myers. However, I put this in the context of -- and it should be clear that, because of the nature of the charges, you are not and can not seek detention on the basis of danger to the public.

MR. MYERS: That's correct, Your Honor. This is merely one of the elements to consider in the permissible argument, which is risk of flight.

THE COURT: I'll hear from you. Keep your comments limited to as these factors address the risk of flight.

MR. MYERS: Your Honor, only contingent -- excuse me -- only continued detention of the Defendant, given the nature and seriousness of the danger posed by his release, can reduce the harm that would be caused. There is no condition or combination of conditions that can secure the Defendant's -- excuse me -- that can successfully secure the Defendant's appearance. Currently, the only calls he can make are to counsel and to his wife, and calls to his wife are closely monitored, although of course calls with counsel are not. They are also the only approved visitors.

It would be difficult, if not impossible, for the Court to fashion conditions that would prevent violations of those sorts of restrictions as opposed to merely addressing them after the fact, and, in fact, under the Bail Reform Act, the only statutory remedies authorized for violation of the Court's release order are modification of the Order, revocation of the Order, or contempt of Court. None of these remedies prevents or mitigates the possibility of release or non-appearance, and the damage done potentially to the national security by the flight of the Defendant would be immediate and irrevocable.

Now, the cases cited by the Defendant for the Court to consider in his responsive pleading, I think, can clearly be distinguished from the case at bar. None of the cases referenced by the Defendant appears to involve evidence that those defendants had digital information and the same potential or expertise to do further harm to the community should they be released. None of those cases involves anything close to the sheer volume and nature of the two decades of classified information that was stolen, and the Defendant's access to and knowledge of highly-classified information coupled with his demonstrated lack of interest in protecting it make him a high-value recruitment target for foreign intelligence services or other bad actors who could try to recruit or pay him now that he's otherwise unemployable.

The Defendant is uniquely and singularly situated in the realm of these offenses. He presents an unprecedented and incomparable value to foreign intelligence or bad actors in a 21st century environment given the value of his extensive technical knowledge of the government's operations and the stolen material itself.

In the Criminal Complaint filed shortly after his arrest at the outset of this investigation, the Defendant faces preliminary charges with a combined statutory maximum of eleven years; however, given what has been shared with the Defendant thus far, he now knows that the evidence suggests that he has engaged in many individual violations of the Espionage Act, and such charges, if run consecutively, could carry statutory penalties and guidelines that could amount to a sentence as high as 30 years to lifetime imprisonment, giving him significant incentive to flee.

The evidence is much more than is necessary for the Court to find that the Defendant poses a risk of non-appearance, and the only means the Court has to address these risks successfully is to order the Defendant held pending trial.

Thank you.

THE COURT: Thank you, Mr. Myers.

MR. WYDA: Your Honor, are you ready for me?

THE COURT: Absolutely, Mr. Wyda.

MR. WYDA: So I -- I admit I'm a little bit baffled about how to proceed, and I guess let me encourage the Court, as usual, to ask me questions about concerns the Court may have. Again, our understanding is this was all about risk of flight and, from the beginning to the end of the Government's presentation, we heard about threats to national security.

THE COURT: Well, I think, Mr. Wyda, the comments that were made by Mr. Myers, I take them in the context of his non-appearance and what that would mean in terms of threat to, danger to the public through his non-appearance, and that's how I'm looking at it, from that perspective.

So I think that what I'd like to hear -- and I'm not going to be conducting direct examination here, but what I'd like to hear is his ties to the community and what basis you have to convince me that he should be released and he is going to appear.

MR. WYDA: Your Honor, that's easy, but -- so let me start this way. Let me talk about who Hal Martin isn't, Your Honor.

First of all, he's not Edward Snowden. He's not someone who, due to political ideas or philosophical ideas or moral principles, thinks he knows better than everybody else and, hence, is compelled to release government secrets to foreign countries in order to prove himself right or morally more principled. He's not Robert Hanssen or Aldrich Ames, someone motivated by greed and willing to harm his country.

Who is Hal Martin? He is -- he's kind of old-fashioned. He believes in old-fashioned principles like duty and honor. He believes in service to his country. He's a Navy veteran who served for four years. He then served for eight years in the Reserves. He believes in hard work. He's worked for more than 20 years -- despite the Government's effort to disparage it, he worked trying to protect his country as best he could for over 20 years, while also getting graduate degrees and a master's degree from George Washington and all the coursework done for a Ph.D. from UMBC.

Hal loves his family. Deb Shaw is here in the front row, along with the pastor of her church and another family friend. His brother, Michael Martin, is there on the side of Deb. He traveled here from Florida to be here in support. He has his sister, who couldn't make it today because she's taking care of their mother and her child in the New England area. I'll leave it at that. But he has -- he loves and he is loved by many people who support him at this time.

A little bit more about Hal, the person, that you're to consider today. Hal's concerns -- his life concerns are similar to all of ours. He's struggling to pay a mortgage. He's got student loans. He's got lawns to cut and leaves to rake. Those were concerns before these charges arrived. Hal is also one of the most voracious minds I've met. He is hungry to learn. He is fully engaged in this process with his counsel. He is a pleasure to work with, and he is starved to understand this process, and engaged in it, and that's the way he goes through life, is trying to get a deep understanding of everything he encounters along the way.

What distinguishes Hal Martin from Edward Snowden and Aldrich Ames the most is his love of country. Hal loves America and believes in the mission of the companies -- of the organizations that he worked for. It seems to me this is particularly important under the Bail Reform Act. It seems like it's particularly important for your decision regarding risk of flight. All of Hal's ties are to this country, and he has been devoted to serving his country throughout most of his life. I want to address that a little bit further later on in my presentation.

There is three reasons why -- you know, why I think what I just said is so true. It's Hal's personal history. It's also the Government's charges in this case.

Your Honor, they've charged Hal purely with obtaining the documents. It's a serious crime. It carries the maximum that it carries, and it brought us here today, but there is significant stuff missing that I frankly think would be of much more concern to the Court in terms of doing what you have to do under the Bail Reform Act, which is project out whether there is a risk of flight. You're making a prediction as to what the risks are.

There is no evidence that Hal shared this information with anyone, that Hal intended to. The Government hasn't charged it that way. My -- they've threatened to bring other charges, but, again, they made no allegations in there that they intend to bring anything more serious than what they've brought already in terms of the retention of the documents. I hope I'm being clear about the significance of that.

Under the Bail Reform Act, we're making a prediction as to whether Hal will flee, and this is an individual who has admitted that he possessed the documents, has confessed to that, and has engaged in a process to cooperate with the Government, repeated meetings with the Government to help them understand what they have, to help them understand how he got them, in two different meetings with the Government. And so, on his own, he confessed to possessing the documents, and then, in repeated meetings with the Government, he helps them understand what he did and what they have.

There is nothing else from the Government on transmittal, any evidence that he's any sort of -- intended to be a traitor to his country, and, Your Honor, they've had these documents now. They've had all of his electronics, with all of the power of the NSA, for six, seven weeks. There is nothing to indicate that Hal Martin is a traitor. There is nothing to indicate that Hal Martin has any animus to his country.

What we see is an individual who has collected. I want to say something about the collection, because that seems to be the elephant in the room, and there is sort of a bizarreness to it that might give the Court pause, again, on the basis of a concern regarding risk of flight.

(Whereupon, Mr. Eisenberg and Special Agent Pino leave the courtroom.)

MR. WYDA: Hal, as I mentioned earlier, is a voracious learner and committed to being excellent at his work. He loves being part of the team. He loves being part of the mission of the National Security Agency in general. Hal desperately wanted to be good. He desperately wanted to make a difference, and he treasured these documents that he started to bring home in order to accomplish that. He started to do that in 1998 --

(Whereupon, Mr. Eisenberg and Special Agent Pino enter the courtroom.)

MR. WYDA: -- and it was always driven by Hal's effort to learn more, to try to be better, serving the mission of the organizations that he was working for.

Your Honor, in some ways, as the Government has presented, taking documents since 1998 is a bad fact for us, but, frankly, I think it's also a favorable fact under the Bail Reform Act, because there is no evidence that any of these documents from 1998 on were released into the public, that this was somehow done in order to betray his country.

What began as an effort by Mr. Martin to be good at his job, to be better at his job, to be as good as he could be, to see the whole picture at his job, became something more complicated than that. It became a compulsion. It got a grip on Mr. Martin, and, frankly, I think the mental health component of this is the only explanation for possessing, you know, 50 terabytes of information. This -- after a while, Your Honor, frankly, this no longer makes sense. You're doing this constantly, gathering more and more information all the time, information you can't possibly get your arms around. There is more information there than Mr. Martin could ever manage or read.

This was not Spycraft behavior. This is not how a Russian spy or something like that would ever conduct business. A large number of the documents were contained in a shed in his backyard that was unlocked, with classified material in it, that had dust everywhere. These are documents that hadn't been looked at, hadn't been touched for years.

This is the behavior of a compulsive hoarder who could not stop gathering and possessing the documents he treasured. Hal has a history of this. His family has reported on it. It's the way he lived for years before he met his wife, Deb Shaw. Deb has helped him at least contain it structurally within the house into his office and the shed so that the rest of the home remained a sense of order that the Government agents, when they went in there, saw the craziness of Hal's office and that shed. His mother has a history of hoarding, and, again, we have received reports that people who have seen Hal's prior residences saw the magnitude of how it was out of control.

I guess, Your Honor, I want to touch on a couple of matters that the Government raised in their written and oral presentation that I think -- you know, that I worry may be of concern to the Government -- I mean, to the Court in terms of releasing Mr. Martin.

First of all, the Government mentions the initial interview with Mr. Martin. We will concede that Mr. Martin was not immediately candid. Again, I have heard from prosecutors -- and you've been one for a long time in a previous life. I don't think it's unusual for folks, upon meeting law enforcement, to immediately come clean. It's not unusual for there at least to be a token attempt at a defense. Mr. Martin's lasted minutes. He then proceeded to tell them everything he knew while waiving his *Miranda* warnings and only meeting the -- you know, the next day.

We then went in to meet with the Government later that evening. We then went into meetings with the Government a few days later, all in an effort to assist the Government to get control of this situation that Mr. Martin regrets creating. Again, Your Honor, I am hoping the inference you draw from that is that this is an individual who, through counsel, is embracing the process of the criminal justice system and is trying to do what he can to make amends for what he's done.

The Government's raised the spectre of additional charges. I don't think Your Honor can do anything with that at this stage. I hope not, but, if Your Honor is going to, at least make them specify what they're doing, because, again, I don't think there is anything else that -- if they had evidence to prove transmittal or something like that, we would have seen it by now.

The Government, in its paper -- and I can't remember now whether they made it a part of their presentation earlier -- that a quote in their paper: As a trusted insider, the Defendant was able to defeat myriad expensive controls placed on the information.

Mr. Martin has a ton of respect for the entities that he worked for. I do as well, but, Your Honor, there was nothing sophisticated about what Mr. Martin did to remove this information from those organizations. When I met

Mr. Martin --

MR. EISENBERG: Excuse me, counsel. We might have to approach the bench, Your Honor.

THE COURT: Come on up.

(Whereupon, a discussion occurred at the bench under seal.)

MR. WYDA: Your Honor, could I have one minute, please?

THE COURT: Absolutely.

(Pause.)

MR. WYDA: Your Honor, again -- I'm ready to proceed if the Court's ready.

THE COURT: Yes.

MR. WYDA: Again, the Government mentioned in its presentation Mr. Martin's technical knowledge, his use of encryption technology, anonymization, and virtual machines techniques. That's in their paper. I think that was in their briefing, their presentation. It's what Mr. Martin does. It's what his graduate degrees are in -- information technology and protecting that information.

Your Honor, again, I'm not sure I'm aware of the Court's facility with these issues, but the U.S. Attorney's Office and we exchange information through encryption all the time. The servers in my office are virtual machines. This is not -- this is not rocket science, Your Honor.

THE COURT: I think the basic premise, if I understand, is that, if you have a certain skill set, this is every day. This is an everyday procedure, and, to those of us who may not do this every day, it may seem extremely complicated, but, if it is your job, you have that skill set, you have that education and training. So I get that, Mr. Wyda.

MR. WYDA: Your Honor, the Government makes a great deal in its paper, and I think they did again today, and, frankly -- you know, full disclosure -- this is one of those moments where I feel like I'm arguing about dangerousness and not about risk of flight, which is where I shouldn't have to go, but, again, it's a little bit hard to envision, you know, sort of what's giving the Court concern, but, again, we've heard much about Mr. Martin's ability to, when he's home, access technology or communicate with someone else in a way that could do harm potentially to the nation's security.

That does not seem to me to be about risk of flight, Your Honor. That seems to be about the prong of the Bail Reform Act that we said wasn't relevant, but, again, as a factual matter, Your Honor, my response to that is what I said at the beginning, which is, before you do that, before you detain him on the basis of that, you have to show some motive, some intention to do some harm with this stuff other than collecting, because the collection is gone. All that is taken out of his house.

What the Government has not shown the Court through its charging documents, through its paper, is any intention, other than the gathering, to do any harm to the country. Again, when we're looking to make a prediction regarding risk of flight, as we have to do under the Bail Reform Act, it seems to me completely necessary to have some bad motive other than the collection, because the harm from the collection is now gone because, trust me, that house is cleaned out. There is nothing remaining there, and the compulsion that was driving Mr. Martin was the collection. There is no evidence that there was any intention to use that.

Your Honor, there is one other matter that I shared with the Court. In the Government's pleading, they share an excerpt of a draft of an e-mail to -- I believe it was the folks at the NSA, in which the Government -- in which Mr. Martin expresses frustration with their not hearing his ideas about how to better protect their secrets, their work. Again, this is Mr. Martin's expertise. This was his role there, which was to advise on these matters, and, in a particularly, I would say, flippant, maybe even a snarky tone, he calls out his colleagues for not listening to him, for not understanding the risks that they were taking, and, again, the Government attributes to that, you know, the notion that Mr. Martin is a disgruntled employee.

I bring this up because, frankly, if we had this letter, I think we may well have submitted it on our behalf. I want to draw your attention, Your Honor, to right before the signature line, you know, that last paragraph right before the signature line that reads:

"If you need reassurance, come have a chat at any time, introduce yourself as a 'Cousin', and we can talk plainly, in a collegial manner. I will even spring for the coffee. My treat, you've earned it, it is a very impressive collection network. I, and alot of other Americans/'Partners' are depending on you guys/gals to do your jobs right so we all make it to retirement without having to learn a foreign language at the end of a gun barrel.

"Best, Hal."

Your Honor, the Government's had everything Hal got for six weeks, and the letter they put in to damage Hal has Hal Martin, at the end of the letter, wrapping himself in the flag, congratulating them on the good work they've done protecting America and protecting him. This is totally who Hal Martin is. He is devoted to the mission. He wants to be part of that team. He's referring to them as cousins. He's so proud of their work and he's -- he's inspired by the quality of their work and grateful for their service to the nation.

That, in my understanding, is what's in every communication that the Government's looking at from Hal Martin. This isn't anybody who has an intention to -- I don't think I have to say it -- harm the country in this Bail Reform Act context, but he doesn't have that intention, and he doesn't have the intention to flee the country. This is his home.

The Government's entire case for flight is that Mr. Martin is desirable to foreign entities the way Edward Snowden was. Eighty percent of their filing in advance of this proceeding was about dangerousness. Risk of flight felt like a token afterthought. It ignores the fact that Mr. Martin has no interest, no desire to be anywhere but here in the country he lives in, with the family he loves.

He has traveled outside of the country as an adult once in his life to France in 2004, I believe it was, other than his Navy service. He has a devoted wife. He owns a home. He has lived in Maryland since 2000. He's lived in the same region since he left the Navy. He is connected to the community through educational institutions and, you know, through family and friends who are here in court today.

Your Honor, the Government also mentions, in the context of risk of flight, a couple of things in its paper, and I believe they did in their presentation as well, that I wanted to take a second to address.

They threw out the possibility that not only might

Mr. Martin flee, but he might be kidnapped by another country because of the value of his mind. Again, I have a ton of respect for everybody at that table, but, Your Honor, that just can't be so.

I'm getting cleared to go into a SCIF where I'm going to look at all that stuff. Ms. Boardman is going to look at all that stuff. Everyone on that side of the table has looked at all that stuff, half the people at NSA have looked at all that stuff, and we're not giving them security so that they can go to the Whole Foods or to the Barnes & Noble bookstore. We have to be able to -- it can't be that we detain Hal Martin in a detention facility because we can't protect him. That's not us. That's not who we are.

Your Honor, there is also a suggestion in the pleading -- and, again, I don't think I heard it today, but I'm just not sure -- that you should consider the fact that Mr. Martin showed some evidence that he studied Russian as a basis to detain him. I don't -- again, I don't want to be disrespectful to the Government, but that sounds like something I would have heard at a presidential debate. This is beneath us.

This is someone who works in the national security. This is somebody trying to protect our country. The notion that he would try to better himself by learning Russian -- a little bit of Russian -- there is no evidence that he's fluent in any way -- it can't be a basis for detention.

Finally, Your Honor, the Government mentions and Pretrial mentions in their report a risk of suicide. I'm assuming that's relevant regarding risk of flight, and, again, it was reported to the Government by Hal's wife on a pretty emotional night that she was worried about Hal when -- because she was worried about Hal, that this was a very stressful night for Mr. Martin, this was a very stressful night for the entire family, and she suggested, either directly or indirectly, that Mr. Martin might -- might lose it.

Your Honor, the Government and I discussed that on the night we went to the detention facility. All of us agreed that he was no risk of suicide, that he was not put under any sort of suicide watch. He's not been under any sort of suicide watch. He has had sheets. He has had clothing that can be turned into a noose.

We did none of the things to protect him from suicide that we would do if that were a serious concern, and, again, I do think very highly of Government counsel and the agents on the other side. They probably care about folks -- you know, my clients in all our cases, but they really care about talking to this guy, and they made no effort to protect him from suicide at that facility. Your Honor, you can't give that any weight in determining whether Mr. Martin is a risk of flight, because they didn't.

The Government has raised the spectre of national security in their filings, and I think again today, even though this is all about risk of flight. We -- our courts -- your role, it seems to me, is even more important in that context when the executive branch plays that card. We historically have made mistakes in this context when the Government raises the spectre of national security. All we can do, Your Honor, is rely upon our laws and our process.

I know you're true to that. You did that with your initial ruling by restricting the Government from not arguing dangerousness and by limiting them to only risk of flight. When you embrace this process of the Bail Reform Act and the law of the Bail Reform Act, there is only one answer, Your Honor, that can be set: Mr. Martin needs to be released on conditions.

He is not a serious risk of flight. It is not credible, Your Honor, with all due respect to the Government's presentation and your role, but it's simply not credible to think this gentleman, who has lived here his entire life -- with the ties that he has in this community, with the way that he has embraced this process, it is not credible to believe that he is going to flee and that there is a serious risk of flight in this case.

Thank you very much, Your Honor.

THE COURT: Thank you, Mr. Wyda.

Mr. Myers, is there any response?

MR. MYERS: Yes, Your Honor. And, as the Court knows, I do have tremendous respect for both Defense counsel, and, as experienced and, you know, very skilled practitioners, I know that they're well aware that, in the federal criminal context, "cooperation" is a term of art, and cooperation and whether the Government chooses to make motions for cooperation, that's based on a determination that something an individual has done, you know, amounts to substantial assistance in an investigation and prosecution, and, without getting into the details of any communications with the Defendant, you know, in the context outside of his initial interview in deference to the agreements that, you know, may have covered those discussions, I'll suffice to say that the Government does not at this point believe that the Defendant has fully or truth -- been fully truthful or forthcoming in the information that he has shared, and I think one example where, after, you know, discussions, you know, he -- I have to credit to a degree, after hours upon hours of searching his home, you know, very experienced agents, they finally left with the trove of evidence that was highly classified that they seized, and, after discussing with the Defendant, they learned that, nevertheless, there were multiple additional disks and external hard drives containing significant quantities of data that they hadn't been able to find because of the -- I guess the skill with which the Defendant had secreted them within his home.

And it is to his credit that he informed us about where to find them, but there is no guarantee at this stage that he's told us about everything that might be stored in his computer or outside of his computer on other systems, and, as the Court well knows, in the modern age of technology, on a piece of media the size of a thumbnail, you can store astounding quantities of information. It is simply impossible to guarantee that, no matter how thoroughly a location is searched, there aren't any devices, whether Internet-enabled or not, that have not been secreted away, particularly by someone who has shown a proliferation for having a number of devices and sophisticated technical knowledge.

And the reason that the Government believes this goes to a flight risk under § (g)(4) is because, whether or not he's able to get his hands on other stolen government material that might not have been recovered, the fact of merely just what's in his head, as Defense counsel, you know, reiterated, we argue, is of immense value to those who may wish to do our country harm, and, if he ends up in the hands of foreign powers, whether or not it's with his consent, an ankle monitor is not going to prevent him from going down the road and ending up in territory that we can't recover him from.

Thank you, Your Honor.

MR. WYDA: Your Honor --

THE COURT: Mr. Wyda or Ms. Boardman, anything?

MR. WYDA: Yes. Just I guess briefly, one thing is -- again, I don't think this possibly gets into anything classified. Your Honor, the documents that he's referring to, the disk that he's referring to, they were behind a bookshelf. Again, Your Honor, please take that into account.

THE COURT: Secret hiding places.

MR. WYDA: Secret hiding places behind the bookshelf. I did that when I was in second grade, Your Honor. Frankly, if that's what they characterize as sophisticated, I hope you take that into account when evaluating the rest of the Government's proffer.

Your Honor, I also want to make sure that what we're offering here -- again, I'm assuming I don't need to do this, because Your Honor knows the panoply of options available, but what we're proposing is a 24/7 lockdown, that he be in the custody of his wife, Deb.

Would you stand up, please, so that -- again, Your Honor has read the Pretrial Service report, but his wife, Deb Shaw, is here. She has an impeccable record herself. She is a church-going woman who works in her church. I know the Government thinks very highly of her. They've had plenty of interactions where she's given them complete access to whatever they've wanted. I think they came in without a warrant to look behind the bookshelf that they forgot to look behind, but, again, Ms. Shaw is here, and she's available to talk with Your Honor if you need any reassurance.

Your Honor, again, Ms. Boardman reminded me that -- of course that, you know, we can set up conditions that would limit his access to any electronic devices. All the computers have been taken out of the house except for Ms. Shaw's laptop, which she can leave at her office and does not need to bring into the home. If there is any other concerns that the Court has or the Government has, we'd happily take care of it.

Your Honor, also, you've seen from the financial section of the Pretrial Services report that Mr. Martin has no means of funding a flight away from, you know, the District of Maryland. There is no -- you know, there are no excess funds. At this point, he is out of work and virtually impoverished.

Your Honor, under the circumstances, there is no serious risk of flight, and we hope that Your Honor will release Mr. Martin under the conditions we've proposed.

Thank you.

THE COURT: Thank you, Mr. Wyda.

First of all, let me explain something. My decision in this case is governed by the Bail Reform Act, 18 U.S.C. § 3142, and how these offenses are applicable to the Bail Reform Act. The Government has originally charged and has only charged the Defendant by a Complaint with two offenses. The Defendant is charged with theft of government property under 18 U.S.C. § 641, and unauthorized removal or retention of classified documents or materials by a government employee or contractor under 18 U.S.C. § 1924.

Under the Bail Reform Act, neither of those sections permit the Government to seek detention on the basis of danger to the public. The Government therefore, under the law that I must follow, is restricted to arguing for detention only on the basis of risk of flight. This is based on the charges. It's not based on the conduct. It's based on the charges. So, when Mr. Wyda noted that the Court has already ruled, I'm ruling in accordance with the Bail Reform Act and the fact that the Government has not indicted under more serious offenses. So I am limited by what I can make a determination, and here, I'm limited on the issue of risk of flight.

I've listened to both sides carefully, and I think that Mr. Wyda has made some very persuasive arguments. No investigation is perfect, and no seizure of evidence is perfect, and there is always this feeling on the Government's side of maybe they've missed something, or maybe they haven't gotten all of the information.

So I'm looking at this case from the issue of the Defendant, from the perspective of his history, his conduct, and the factors that I'll speak about individually in a few moments, but it's clear from what has been presented to the Court the Defendant has been engaged in this illegal conduct for 20 years, from 1996 -- and I think Mr. Wyda referenced 1998, so let's just say it's either 18 or 20 years, but it's a long-term conduct. It has been described as a sort of hoarding and maybe a compulsive disorder. That might be true. That might not be true.

But what I'm left with is the fact that someone who has been entrusted with these kind of documents and this sort of access has, for a period of 18 to 20 years, been conducting this hoarding, removing documents that are highly classified, that certainly the dissemination of which would cause grievous harm, according to the Government, to this country.

As Mr. Wyda pointed out -- and the Government has not argued otherwise -- there has been no evidence presented to this Court of dissemination of this information. There has been no evidence that any of these documents were located in any other place other than where they were recovered.

However, there is also no evidence that all of the documents -- I'm only faced with what I have, but that all of the documents were recovered, and we know it's been a long-term obsession to remove these documents and to store these documents, and there is no reason for me to believe that all have not been recovered, but it does leave sort of a gap.

That being said, Mr. Wyda very correctly argued that all of the people at both tables, along with many other persons who are employed with appropriate security clearances, have viewed and will view these documents. The difference with the Defendant is that all of the people at this table and all of those other persons have not been removing them from a secured facility.

When I saw the excerpt that Mr. Wyda referred to and that the Government had referred to in its written motion, I agree with Mr. Wyda. I think that the Defendant paints himself to his colleagues, right or wrong, as somebody who is smarter and is willing to help them, is willing to help them make their control of these kinds of documents more secure; however, you don't really do that by removing 50 terabytes of classified documents and documents that belong to the government.

So what I see is we have a person here who may be two persons: the person who may be the smart kind of guy at work who co-workers may or may not look up to, but certainly is attempting to help them, and, at the same time, someone who is walking out the back door with documents that he knows better from his 20 years as a contractor and also from his time in the Navy that he has no business removing from that facility, and the grave harm that could result. Now, I say that in the context of risk of flight.

There is some information contained in the Pretrial

Services report that gives someone great pause, and it gave the Pretrial Services officer great pause. One of them is his problems with alcohol and binge drinking episodes that he admits to. Another thing that gives me great pause and would give anyone great pause is that -- and the Government failed to mention this in their presentation, but one firearm was recovered on the floor of his vehicle -- it was a handgun that was fully loaded, according to the Government's written motion -- and at least ten other firearms, or maybe nine other firearms were recovered from the residence. Two of those were assault-type weapons. One was an AR-type weapon, and the other one was a shotgun with some modifications.

Now, that's not illegal for him to have, but what's really odd about that is that his partner, Ms. Shaw, who is here, or wife, Ms. Shaw, according to the statements from the Government, was unaware that he even had the firearms. So you have someone who presents themselves as two different people. And I think that I agree with Mr. Wyda. There is some serious mental health issues going on here, and maybe there is other things going on here as well, but certainly he has a number of issues that concern his mental health.

He's a highly-educated man who is certainly capable -- and now, as a Ph.D. candidate at UMBC in this very field, he's certainly capable of doing at least what the Government suggests, that there is a possibility that there is other information out there.

But, in terms of risk of flight, once the Court determines that the Government has a right to seek detention, which they do, only under risk of flight -- and I'm going to make my comments clear. Once the Government makes that determination, I look at certain factors that I am compelled to look at under the Bail Reform Act: The nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of § 1591, a federal crime of terrorism, or involves a minor victim, or controlled substance.

Looking at the nature and circumstances of the offense in this particular case, it is an egregious offense. The nature and circumstances of the offense alone, if there was an argument that could have been made for danger, would certainly have warranted detention.

The weight of the evidence against the person: When the FBI recovers 50 terabytes of information and documents, many of which were highly classified -- other documents, I'm sure, were classified -- then certainly the weight of the evidence is very strong.

The history and characteristics of the person: This is sort of what I was talking about before. We have someone who may be presenting them self one way, and maybe doing something completely different, and I think that's evident in the fact that, you know, he presents himself as sort of the protector of NSA and classified information, but yet walks out and stores it in an unlocked storage shed, information that I am sure many of this country's enemies would love to explore.

So, when looking at the issue of risk of flight, based on the Pretrial Services report, where they really don't address a lot of these issues, but they do address the alcohol abuse, the fact that -- and Mr. Wyda pointed out the fact that there is certainly a mental health issue, and he does have ties to the community, and I credit his family for being here, but remember: For 20 years, while this was going on, his family was there, and I'm sure they knew nothing about this.

So, based on the issue of risk of flight, I find by a preponderance of the evidence that the Defendant does pose a risk of flight, and I will detain the Defendant on that basis alone. If the Court were to also consider, under § 3142(g)(4), the nature and seriousness of the danger to any person in the community that will be posed by the person's release, if I were to consider that, I would also find, by clear and convincing evidence, that there are no conditions that could ensure the safety of the public as well as the presence of the Defendant.

However, I'm detained -- as I'm saying, the Government has restricted my decision to the issue of risk of flight; however, one of the factors, as I've said, under

§ 3142(g)(4), the nature and seriousness of the danger to any person in the community that will be posed by the release, it's clear that the Government sort of paints the Defendant as a walking encyclopedia of classified information. I don't know if that's completely correct, but I do know that he had access to all of this information, and I credit him, and I certainly am glad we're not sitting here talking about dissemination of information to foreign powers.

But, at the same time, he is a serious risk to the public. His release would pose that, and, under § (g)(4), if I were to consider that, I would find that and find by, as I said, clear and convincing evidence there are no conditions that could be set.

So that is my ruling. Is there anything further?

MR. MYERS: Nothing from the Government, Your Honor.

THE COURT: Okay. Thank you.

MR. WYDA: Not from the Defense, Your Honor. Thank you.

MR. EISENBERG: Pleasure, Your Honor.

THE CLERK: All rise. This Honorable Court now stands in recess.

(Proceedings adjourned.)

CERTIFICATE OF OFFICIAL REPORTER

I, Martin J. Giordano, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Maryland, do hereby certify, pursuant to 28 U.S.C. § 753, that the foregoing is a true and correct transcript of the stenographically-reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 24th day of October 2016.

Martin J. Giordano

MARTIN J. GIORDANO, RMR, CRR

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